Nu Skin International, Inc. *and* Graphic Communications International Union, AFL–CIO, Petitioner. Case 10–RC–14132

April 22, 1992

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

The National Labor Relations Board, by a three-member panel, has considered objections to an election held August 2, 1991, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 217 for and 200 against the Petitioner, with 16 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs and adopts the hearing officer's findings[1] and recommendations only to the extent consistent with this decision.

We adopt the hearing officer's recommendation that the Employer's Objections 3–4 and part of Objection 5 be overruled.[2] However, we do not adopt the hearing officer's recommendation to sustain the portion of the Employer's Objection 5 concerning the Union's distribution of T-shirts to employees.[3]

1. On the day before the election, the Union hosted a free picnic luncheon for employees. The luncheon, held during the first and second shifts' mealbreaks, took place in a parking lot adjacent to the Employer's facility. During the luncheon, union representatives distributed ''Union Yes'' T-shirts.[4] To receive a T-shirt, employees were required to sign a prounion petition that was to be used as a handbill on election day. The petition was headed ''WE ARE VOTING YES ON AUGUST 2ND!'' and stated that the undersigned employees agreed to openly support the Union and asked their coworkers to join them.

The hearing officer found that, as the T-shirts—costing $4 or $5—were of nominal value, their free distribution in itself, under established precedent,[5] was not objectionable conduct. He further found, however, that the Union's inducing employees to sign the prounion petition by requiring signing as a condition of receiving a T-shirt constituted objectionable conduct. In so ruling, he analogized the T-shirt offer to a union's offering to waive initiation fees conditioned on employees' signing authorization cards. In *NLRB v. Savair Mfg. Co*.,[6] the Supreme Court found such a fee waiver objectionable because it ''allow[ed] the union to buy endorsements and paint a false portrait of employee support during its election campaign.''[7] In finding *Savair* applicable to the Union's distribution of T-shirts, the hearing officer concluded that the nominal monetary value of the T-shirts was irrelevant, noting that in *Savair* the waived initiation fee was a ''nominal'' $10.

Contrary to the hearing officer, we find *Savair* inapplicable to the Union's offer of the T-shirts, as the T-shirt offer differs from *Savair*'s fee-waiver offer in several important respects. First, we do not agree that the value of the fee waiver in *Savair* was irrelevant. In *Savair*, the Court was concerned that the Union's offer of a fee waiver in exchange for employees' signing union authorization cards amounted to the buying of endorsements. The Court described the value of the fee waiver as follows:

> Under the bylaws of the Union, an initiation fee apparently was not to be higher than $10; but the employees who testified at the hearing (1) did not know how large the fee would be and (2) said that their understanding was that the fee was a ''fine'' or ''assessment.'' [414 U.S. at 274.]

Thus, in *Savair* the employees did not know the amount of the initiation fee and feared it to be a fine or assessment. Therefore, the inducement at issue in *Savair*—avoiding an obligation to pay a fee or fine of uncertain magnitude—was not understood to be something of only nominal value. Rather, the fee waiver in

[1] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co*., 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[2] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule Objections 1 and 2 and his finding that employee Gunn, whose alleged actions pertained only to Objection 1, was not an agent of the Union.

In adopting the hearing officer's October 8, 1991 order denying the Employer's motion to reopen the record, we additionally note that the evidence that the Employer wished to introduce was not shown to have been previously unavailable.

[3] The Union contends that, because its distribution of T-shirts was not raised in an objection, the hearing officer erred in considering whether this activity constituted objectionable conduct. We find, however, that the hearing officer properly considered this issue because it was raised at the hearing not by the objecting party, the Employer, but rather through the Union's own examination of witnesses and, contrary to the Union, was fully litigated. See generally *White Plains Lincoln Mercury*, 288 NLRB 1133, 1138 fn. 24 and accompanying text (1988); *John W. Galbreath & Co*., 288 NLRB 876, 878 (1988); cf. *Iowa Lamb Corp*., 275 NLRB 185 (1985).

[4] The T-shirts carried the slogan: ''The Best Things in Life are Negotiable. UNION YES.'' Between ''UNION'' and ''YES'' was a square containing a check mark.

[5] See *R. L. White, Inc*., 262 NLRB 575 (1982).

[6] 414 U.S. 270 (1973).

[7] Id. at 277.

Savair was understood as possibly having significant monetary value.

By contrast, in the present case, it was undoubtedly clear to all concerned that the T-shirts offered by the Union were inexpensive items. As the hearing officer properly found that the T-shirts were of such little value that their free distribution in itself would not interfere with employee free choice, it is a considerable leap to conclude that the offer of these ''Union Yes'' T-shirts conditioned on employees' signing a prounion petition was an inducement tantamount to buying endorsements.

Further, in *Savair* all employees, regardless of their view on unions, had an economic interest in obtaining the fee waiver that was offered as an inducement to sign union authorization cards. The alleged inducement here, however—the ''Union Yes'' T-shirts—would reasonably be desirable only to employees who favored the Union and wanted to proclaim their prounion view. Thus, contrary to the hearing officer, the Union's requiring employees to sign a prounion petition in order to obtain a prounion T-shirt would not reasonably induce nonsupporters to sign the petition and thereby allow the Union to paint a false portrait of employee support.

Finally, even assuming arguendo that the T-shirts might be desirable to nonsupporters, the Union in that event had a justifiable interest in trying to assure that T-shirts were distributed only to employees who would wear them as campaign paraphernalia in support of the Union. Requiring employees desiring T-shirts to sign a prounion petition was a reasonable means for the Union to try to accomplish this objective. There was no comparable protected interest in *Savair* to justify the union's limiting the fee waiver there to union supporters. In sum, on these facts we find the rationale of *Savair* inapplicable to the Union's distribution of T-shirts, and we overrule the portion of Objection 5 sustained by the hearing officer.[8]

2. In Objection 4, the Employer contended that the Union created an atmosphere of fear and coercion that destroyed laboratory conditions by photographing employees at the picnic luncheon in violation of *Pepsi-Cola Bottling Co. of Los Angeles*.[9] Union representatives took about 88 snapshots of employees attending the Union's picnic luncheon. In many of the photographs, employees posed for the camera, sometimes displaying their union T-shirts. The hearing officer found that the photographs were for the purpose of memorializing the chicken meal and perhaps to publish in a union newspaper. He found disingenuous two employees' testimony that they were ''concerned'' or ''felt funny'' about their pictures being taken. In recommending overruling Objection 4, the hearing officer found that the photographs were innocuous and that the Union's taking of them did not reasonably tend to interfere with the employees' free and uncoerced choice in the election. We agree.

In adopting the hearing officer's recommendation, we find the photographing of employees at issue in Objection 4 markedly different from the photographing found objectionable in *Pepsi-Cola* and *Mike Yurosek & Son, Inc*.[10] In *Pepsi-Cola*, on the day before the election, while a union rally was in progress in front of the employer's premises, a union representative appeared to videotape at least two employees as they exited the employer's premises and were handed union leaflets. No explanation for the videotaping was offered then or at the hearing. Finding that the videotaping intruded on the employees' right to refrain from union activities, the Board concluded that, in the absence of explanation from the union, the employees could reasonably believe that the union was contemplating future reprisals against them.

In *Mike Yurosek*, almost every day during an election campaign a union representative took photographs of prounion and antiunion employees' campaign activities at the employer's entrance gate. The union representative told an antiunion activist, ''We've got it on film; we know who you guys are . . . after the union wins the election some of you may not be here.'' Finding the photographing objectionable, the Board noted that no explanation of the photographing was provided to assuage the employees' fears and that the union representative's statement was arguably threatening. The Board also noted that no valid explanation of the photographing was offered at the hearing.

Thus, in both *Pepsi-Cola* and *Mike Yurosek*, employees at the plant entrance in the presence of union campaign activity were photographed or videotaped by the union. Under the circumstances, the employees might well have felt that their responses to the union campaign activity were being recorded for the purpose of future retaliation. In the present case, however, the subject of the photographs was employees voluntarily attending a union-sponsored picnic luncheon. While photographing the activities present in *Pepsi-Cola* and *Mike Yurosek* might readily suggest retaliatory purpose, the Union's photographing of employees enjoying a voluntarily attended picnic does not reasonably suggest any such purpose.[11] Moreover, when the Employer's security guard, who was attending the picnic,

[8] We similarly reject the Employer's contention, in its brief in opposition to the Union's exceptions, that the Union's providing T-shirts in conjunction with its providing the picnic luncheon unduly influenced the employees' vote. See *R. L. White, Inc*., above; *Lach-Simkins Dental Laboratories*, 186 NLRB 671 (1970).

[9] 289 NLRB 736 (1988).

[10] 292 NLRB 1074 (1989).

[11] The record indicates that photographs similarly were taken at an employer-sponsored picnic held about 2 weeks before the Union's picnic.

asked why a union representative was taking photographs, the union representative stated that ''You all are going to make the front page of USA Today,'' and ''we want to remember this fun-filled memory.''[12] At the hearing, union representatives testified that the photographs were taken for submission to the union newspaper and to offer to employees, and that the Union had, in fact, distributed photos to employees at a party after the election. This explanation is consistent with what the security guard was told. Thus, we find the Union's photography here innocuous and entirely distinguishable from that in *Pepsi-Cola* and *Mike Yurosek.*

[12] Employees Ratliffe and Nuney (or Mooney), who testified for the Employer concerning the Union's taking photographs, did not ask any union representatives why the Union was taking photographs. Employee Thomas, another employer witness, testified that he asked this question but could not remember the answer he received.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Graphic Communications International Union, AFL–CIO and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All regular full-time and regular part-time service warehouse employees, including coordinators, front fillers, distributor window employees, certificate area employees, quality control employees, maintenance and custodial employees, excluding all other employees, office clerical employees, professionals, guards and supervisors as defined in the Act.